

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT Docket No. 99-217 /

In the Matter of)

Promotion of Competitive Networks)
in Local Telecommunications Markets)

Wireless Communications Association)
International, Inc. Petition for Rulemaking)
to Amend Section 1.4000 of the)
Commission's Rules to Preempt)
Restrictions on Subscriber Premises)
Reception or Transmission Antennas)
Designed to Provide Fixed Wireless)
Services)

**REPLY COMMENTS OF AT&T CORP.
REGARDING THE REGULATORY FLEXIBILITY ACT**

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February 21, 2001

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REGARDING THE REGULATORY FLEXIBILITY ACT

AT&T Corp. ("AT&T") respectfully submits these reply comments in response to comments of the Real Access Alliance ("RAA") with respect to the Commission's Initial Regulatory Flexibility Analysis ("IRFA"). *See* Joint Regulatory Flexibility Act Comments of the Real Access Alliance (Jan. 22, 2001) ("RAA Joint Regulatory Comments").

BACKGROUND AND SUMMARY

Under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq.*, the Commission must publish an IRFA to put small business entities on notice of proposed regulations that might affect them, and to provide a "description of any significant alternatives" that could minimize the burden on them. *Id.* § 603(c). RAA contends that the Commission's IRFA provides "no actual discussion of such alternatives." RAA Joint Regulatory Comments at 3. As demonstrated

below, this criticism is groundless because the Commission has adequately described alternative approaches and explained how these approaches might serve to lessen the regulatory burden on small businesses. As a result, it plainly has complied both with the letter and spirit of the RFA.

ARGUMENT

Section 603 requires that the Commission's IRFA contain "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603. RAA contends, however, that despite the Commission's description of precisely such alternatives, the IRFA "contains no actual discussion of any such alternatives." RAA Joint Regulatory Comments at 3. It argues that "[t]he Commission must therefore withdraw its pending FNPRM and reissue it with a revised IRFA that includes the required analysis of less burdensome alternatives." *Id.* at 5. The RAA's efforts to delay implementation of a non-discriminatory access rule by the Commission are baseless and should be rejected.

1. Despite the Alliance's claim that a deficient IRFA is a "fatal defect to the adoption of a new rule," the Commission's compliance with § 603 is unreviewable at this stage by any court. In *Allied Local and Regional Manufacturers Caucus v. EPA*, 215 F.3d 61 (D.C. Cir. 2000), the D.C. Circuit held that it was without jurisdiction to consider challenges under § 603 to an agency's IRFA. *Id.* at 79. The court reviewed several challenges to rules promulgated by the EPA, including a contention that the EPA, by minimizing the impact of the rules on small business entities and not considering all "significant alternatives," failed to comply with § 603 of the RFA. The court relied on the explicit language of § 611(c) of the RFA: "Compliance or noncompliance with the provisions of this chapter shall be subject to judicial review only in accordance with this section." *Id.* Section 603, however, is not included on the lists of

provisions which are subject to judicial review, see § 611(a)(1). To be sure, defects in the IRFA can be considered as part of the judicial review of the underlying rule, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 537-39 (D.C. Cir. 1983); but, so long as the Commission solicits robust comment and promulgates rules on the basis of substantial evidence, a flaw in the IRFA presentation, should one exist, would not otherwise undermine the reasonableness of the rules that the Commission promulgates. *Accord State of Michigan v. Thomas*, 805 F.2d 176, 188 (6th Cir. 1986) (holding that agency's failure "to prepare a complete initial regulatory flexibility analysis under section 603 does not affect the reasonableness of the final action").

2. But even if the Commission's IRFA were reviewable at this stage, it clearly meets the standard laid out even in the cases cited by the RAA. In *Southern Offshore Fishing Association v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998), the court explained that the standard for compliance with those provisions of the RFA that are reviewable (*i.e.*, § 604 governing an agency's Final Regulatory Flexibility Analysis ("FRFA")), is not demanding and "does not require mechanical exactitude." *Id.* at 1437.¹ Specifically, "the statute compels the Secretary to make a 'reasonable, good-faith effort,' prior to issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives." *Id.* (quoting *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114-15 (1st Cir. 1997)).²

¹ The court in *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 n.9 (1st Cir. 1997), noted that the RFA itself contains no "heightened" specificity requirement. Thus, the RFA stands in stark contrast to statutes such as the National Environmental Policy Act, which require that environmental impact statements be "detailed." 42 U.S.C. § 4332(2)(C).

² See also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000); *National Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp.2d 33, 43 (D.D.C. 2000).

The court in *Southern Offshore* concluded that the FRFA at issue failed to comply with the RFA because it was entirely inconsistent with record evidence, stemming in part from the agency's failure to prepare an IRFA, "which would have required [the agency] to engage in a careful and meaningful study of the problem from the beginning." 995 F. Supp. at 1436.

In stark contrast, the Commission here prepared an IRFA that seeks to solicit comment on several alternatives to the proposed rules.³ For instance, recognizing that "certain aspects of a nondiscriminatory access requirement have the potential to burden small entities," the Commission "inquire[d] whether it would be appropriate to differentiate between commercial and residential buildings if a nondiscriminatory access requirement is implemented," as well as whether such a nondiscriminatory access requirement should "be triggered only if a building meets some threshold number of square feet, number of tenants, or gross rental revenue." *Further Notice*, App. D at 149-50. Further, so as to "minimize any potential burden on building owners, including small entities," the Commission solicited comment on "accommodating building space limitations and ensuring building safety and security." *Id.* at 150. And because it recognized that the proposed rule that would "abrogat[e] exclusive contracts may interfere with the investment back[ed] expectations of the parties to such contract, including small entities," the Commission sought comment on whether it should "phase out exclusive access provisions by establishing a future termination date for these provisions," and more specifically whether it should "phase out exclusive access provisions for carriers that qualify as small entities." *Id.* To

³ See First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 2000 FCC LEXIS 5672 (rel. Oct. 25, 2000) ("*Further Notice*").

be sure, the Commission need not adopt these alternative approaches if they are inadequate to meet Congress' and the Commission's goals.

At this stage of the rulemaking, the Commission's role, as required by the RFA, is to provide notice to small businesses of proposed rules that might impact them, and to solicit comments from them in the hope of reworking the rules so as to minimize the burden. See RFA, P.L. 96-354, 94 Stat. 1164, § 2(b) (Sept. 19, 1980). Specifically, the RFA requires that "the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses . . . to examine the impact of proposed and existing rules on such entities." *Id.* To suggest that the Commission has not provided sufficient discussion of the alternative approaches is to misunderstand the role of the Commission at this stage of the rulemaking, which is solely to solicit comment from the public rather than to promulgate final rules.

The Commission has discussed possible alternatives and satisfied its obligations under the RFA. RAA's request that the Commission withdraw its FNPRM and reissue a revised IRFA is baseless and would merely serve to delay the timely resolution of these proceedings. The Commission has demonstrated both in its IRFA for the current FNPRM and in the IRFA for the original NPRM that it is committed to soliciting comments from small businesses and to considering alternative regulations that will minimize the burden placed on such businesses while fully meeting Congress and the Commission's regulatory goals.

CONCLUSION

The Commission has satisfied the requirements imposed by the RFA. The Commission's efforts should be allowed to proceed without further impediment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark Trocinski, do hereby certify that, on this 21st day of February, 2001, I served a copy of the Reply Comments of AT&T Corp. Regarding the Regulatory Flexibility Act via First Class mail on the attached service list.

A handwritten signature in black ink, reading "Mark Trocinski", written over a horizontal line.

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